

Legislative Analysis



PROHIBIT SAME-SEX MARRIAGES AND SIMILAR UNIONS

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Ballot Proposal 04-02
Placed on the ballot by initiative petition
November 2004 General Election

Complete to 10-25-04

THE CONTENT OF THE BALLOT PROPOSAL:

The following is the official language as it will appear on the ballot:

*A PROPOSAL TO AMEND THE STATE CONSTITUTION TO SPECIFY WHAT CAN BE
RECOGNIZED AS A "MARRIAGE OR SIMILAR UNION" FOR ANY PURPOSE*

The proposal would amend the state constitution to provide that "the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose."

Should this proposal be adopted? Yes or No

BACKGROUND INFORMATION:

Current Michigan Law. Several provisions of law require that marriage can only be between a man and a woman. They are contained in Chapter 83 of the Revised Statutes of 1846. Section 1 (MCL 551.1) says:

Marriage is inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting that unique relationship in order to promote, among other goals, the stability and welfare of society and its children. A marriage contracted between individuals of the same sex is invalid in this state.

Section 2 (MCL 551.2) says, in part:

"So far as its validity in law is concerned, marriage is a civil contract between a man and a woman, to which the consent of parties capable in law of contracting is essential."

Sections 3 (MCL 551.3) and 4 (MCL 551.4) prohibit marriage between certain specified relations and also prohibit, respectively, a man from marrying a man and a woman from marrying a woman.

Federal Law. In 1996, President Clinton signed into law the Defense of Marriage Act (DOMA), which provided that "No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship" (28 U.S.C. § 1738C). DOMA also provided definitions of the terms "marriage" and "spouse" for federal purposes.

DOMA says, "In determining the meaning of any Act of Congress, or any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or wife." (1 U.S.C. § 7)

Massachusetts Law. Massachusetts is the only state that allows same-sex marriages. This is the result of a 4-3 ruling by the Massachusetts Supreme Judicial Court in November 2003 (Goodridge, et al. v Department of Public Health), which said that to deny two individuals of the same sex the ability to marry is a violation of the state constitution. The court said, "Barred access to the protections, benefits, and obligations of civil marriage, a person who enters into an intimate, exclusive union with another of the same sex is arbitrarily deprived of membership in one of our community's most rewarding and cherished institutions. That exclusion is incompatible with the constitutional principles of respect for individual autonomy and equality under law." The court stayed the decision for 180 days to allow the state legislature to address the matter but subsequently, in response to a question from the legislature, ruled that civil unions (instead of marriage) would not meet the standards of Goodridge. Marriage became available to same-sex couples in Massachusetts on May 17, 2004.

Vermont Law. Since July 1, 2000, Vermont has allowed eligible couples of the same sex to be joined in civil unions. According to the Vermont Guide to Civil Unions, published by the Vermont Office of the Secretary of State, "Parties to a civil union shall have all the same benefits, protections and responsibilities under Vermont law, whether they derive from statute, policy, administrative or court rule, common law or any other source of civil law, as are granted to spouses in a marriage." According to the Guide, "a party to a civil union is included, by law, in any definition or use of the terms 'spouse,' 'family,' 'immediate family,' 'dependent,' 'next of kin,' and other terms that denote the spousal relationship, as those terms are used throughout Vermont law."

Civil unions are certified by judges, justices of the peace, and clergy. Civil unions can be dissolved in the same way that marriages are dissolved.

The law was enacted by the legislature in Vermont after the Vermont Supreme Court ruled, in December 1999, that excluding same-sex couples from marriage was in violation of the state constitution. The court requested the legislature to address the issue, and the legislature enacted a civil union statute.

Other States. California and New Jersey have so-called *domestic partnership* laws that apply to those in a committed lesbian or gay relationship and those in a committed opposite-sex relationship where one partner is 62 years old or older. To qualify, couples must, among other requirements, share a common residence and agree to be jointly responsible for each other's basic living expenses incurred during the partnership. In California, couples can register with the state as domestic partners; in New Jersey, domestic partnership registration is with local registrars. Information on the details of the California law can be obtained from the California Secretary of State's website (www.ss.ca.gov under "Special Programs Information"). Information on the New Jersey law is available from the Department of Health and Senior Services website at www.state.nj.us/health/vital.

Hawaii allows for a *reciprocal beneficiary relationship*, which provides a number of the rights, benefits, and obligations of marriage to couples prohibited by state law from marrying. This includes, but is not limited to, such relationships as brother and sister of the half as well as to the whole blood, uncle and niece, aunt and nephew, widowed mother and her unmarried son, and two persons of the same sex/gender. Couples must register with the Hawaii Department of Health. Information is available at www.hawaii.gov/health/vital-records/reciprocal.

Employer Benefits for Domestic Partners. According to the Employee Benefit Research Institute in a March 2004 background paper, a recent national survey indicated that 19 percent of firms offer domestic partner benefits to employees, with 11 percent offering benefits to same-sex couples. Not all of those firms offer full health coverage benefits, however. EBRI cites information from the Human Rights Campaign Fund indicating that 211 of the Fortune 500 companies offer domestic partner benefits.

In Michigan, a number of public universities offer such benefits, including the University of Michigan, Michigan State University, and Wayne State University, as well as a few school districts and local units of government. At the University of Michigan, for example, if a same-sex partnership meets the institution's criteria, including registering a "declaration of domestic partnership" with the City of Ann Arbor or other government entity, then "any benefits, privileges, rights and responsibilities that accrue to spouses of University faculty and staff by virtue of their status as spouses will accrue to committed same-sex partners of University faculty and staff by virtue of their status as same-sex partners" (quoted from the web page of the University of Michigan Benefit Office).

DISCUSSION OF BALLOT LANGUAGE:

The proposed constitutional amendment goes beyond current state law by applying not only to marriage but also to any *similar union for any purpose*. It is not clear how this phrase would be applied; its precise application will likely be settled by the courts. The proposal would appear to prohibit the "similar unions" permitted in some other states (as described in the section above) that provide marriage-like benefits. In dispute, however, is whether the constitutional amendment would affect future domestic partner benefits offered by public and private employers in Michigan.

FISCAL IMPACT:

The proposal does not appear to have any significant direct fiscal impact on the state or on local governments.

ARGUMENTS:

Supporters of the Proposal make the following arguments

** The proposed constitutional amendment reiterates current state policy. State law already says that “marriage is inherently a unique relationship between a man and a woman,” and that “A marriage contracted between individuals of the same sex is invalid in this state.” The ballot proposal would emphasize (and protect) state public policy by putting it into the state constitution. This will prevent judges from striking down state law based on their interpretations of other provisions in the state constitution, as has happened in other states.

** One commentator has noted that marriage is a “fundamental human institution that is uniquely protected in the law and culture,” and yet “predates the law and . . . constitution, and is an anthropological and sociological reality, not primarily a legal one.” From this point of view, marriage is understood as the union of two sexes (not just two individuals) and of two families; it is intended for the natural reproduction of the human race and offers the optimal environment for raising children. To allow marriage in any other form is not to “expand” the definition of marriage or to “extend” marriage to other kinds of couples, it is to fundamentally alter marriage as it has been traditionally understood. Efforts to alter traditional marriage are driven by the selfish needs of individuals, not the needs of children. (Quotation from Robert H. Knight of the Culture and Family Institute)

**The United States Conference of Catholic Bishops, in a document issued on November 12, 2003, has made the religious argument against same-sex marriage in the following way:

— The natural structure of human sexuality makes man and woman complementary partners for the transmission of human life. Only a union of male and female can express the sexual complementarity willed by God for marriage. The permanent and exclusive commitment of marriage is the necessary context for the expression of sexual love intended by God both to serve the transmission of human life and to build up the bond between husband and wife. In marriage, husband and wife give themselves totally to each other in their masculinity and femininity. They are equal as human beings but different as man and woman, fulfilling each other through this natural difference. This unique complementarity makes possible the conjugal bond that is the core of marriage.

— For several reasons a same-sex union contradicts the nature of marriage: It is not based on the natural complementarity of male and female; it cannot cooperate with God to create new life; and the natural purpose of sexual union cannot be achieved by a

same-sex union. Persons in same-sex unions cannot enter into a true conjugal union. Therefore, it is wrong to equate their relationship to a marriage.

— Across times, cultures, and very different religious beliefs, marriage is the foundation of the family. The family, in turn, is the basic unit of society. Thus, marriage is a personal relationship with public significance.

** Contrary to claims by opponents, the constitutional amendment does not discriminate against any individual. Marriage will continue to be open to anyone who meets the criteria in state law. There have always been restrictions on marriage, including restrictions on age and blood relationships. Once the law's criteria are met, everyone is treated equally.

** Some of the goals of same-sex couples can be achieved through other, already permitted, methods: contracts, powers of attorney, wills, etc. Instruments exist that allow for joint ownership of property; inheriting property; hospital visitation; medical decision-making; and other forms of participation by one person in another person's life. While the campaign to allow same-sex couples to marry is promoted as a means of extending civil rights, based on concepts of equality and tolerance, it is really designed to overturn traditional sexual morality.

** Changing the concept of marriage will be harmful to society and to heterosexual marriage. Legitimizing same-sex marriages based on individual rights could lead to the collapse of other prohibitions, such as polygamy and polyamory (group marriage). Marriage as a cultural institution will be weakened and devalued. Defenders of traditional marriage will then face discrimination and punishment: their refusal on moral or religious grounds to acknowledge the legitimacy of such unions would expose them to litigation and legal sanctions, and could lead to their being denied the ability to obtain employment or contracts with public and private entities.

Opponents of the Proposal make the following arguments

** The ballot proposal goes too far in several ways. State law already prohibits same-sex marriages, so there is no need to amend the constitution. Moreover, amending the constitution serves to shut off debate on a subject that is in flux; many people are examining this subject afresh or for the first time. While public sentiment in Michigan may not favor same-sex marriages or similar unions for the foreseeable future, it is a mistake to overreact and unnecessarily place an expansive prohibition in the constitution.

** The proposed constitutional amendment goes too far in another way. Not content to prohibit same-sex marriage, the ballot proposal also would not allow "similar unions for any purpose." This would appear to rule out civil unions, domestic partnerships, reciprocal beneficiary relationships, and similar marriage-like arrangements for same-sex couples. Same-sex couples are already forming partnerships, creating households, and raising children. What does this constitutional amendment mean for them?

** The proposal, moreover, at the very least raises doubts about the ability of employers to offer “domestic partner” benefits to employees, whether same-sex partners or unmarried opposite-sex partners. The AFL-CIO has said that it opposes the measure because it would take away benefits that have already been negotiated into union contracts and would prohibit all public employers from continuing to offer health and pension benefits through domestic partnerships. This aspect of the proposal seems like overkill aimed only at harming homosexuals (and others), not promoting traditional morality. It will result in painful and divisive litigation.

** Opponents say that it is wrong, and perhaps unprecedented, to amend the state constitution to reduce or restrict civil rights. This is essentially a civil rights issue. An editorial in the Economist magazine of February 28, 2004 put it this way: "The case for allowing gays to marry begins with equality, pure and simple. Why should one set of loving, consenting adults be denied a right that other such adults have and which, if exercised, will do no damage to anyone else." The argument that marriage (and similar unions) should be reserved for heterosexual couples, the editorial says, is "to obscure the real nature of marriage, which is a binding commitment, at once legal, social and personal, between two people to take on special obligations to one another. If homosexuals want to make such marital commitments to one another, and to society, then why should they be prevented from doing so while other adults, equivalent in all other ways, are allowed to do so?"

** To argue that allowing same-sex marriage violates the strongly held religious beliefs of some people, is to ignore the traditional separation of church and state that aims to prevent the state from enacting laws to discriminate against those with different religious beliefs. Marriage is a secular institution. Churches cannot be required to “bless” or “celebrate” marriages or unions of which they disapprove. Further, a number of religious denominations oppose the proposed constitutional amendment based on their own understanding of the requirements of their faith.

** One well-known newspaper columnist has argued that it is not a "conservative" or "traditionalist" position to oppose same-sex marriage. He has argued, "The conservative course is not to banish gay people from making such commitments. It is to *expect* that they make such commitments. We shouldn't just allow gay marriage. We should *insist* on gay marriage. We should regard it as scandalous that two people could claim to love each other and not want to sanctify their love with marriage and fidelity." (David Brooks in the New York Times on November 22, 2003) The crisis that afflicts marriage today would not be made worse by allowing same-sex couples to marry; on the contrary, it would provide a reaffirmation of the importance of this institution as a way of binding two people together in a manner that goes beyond mere private contract.

** Some opponents say that amending the constitution to prohibit recognizing same-sex unions could have negative economic consequences for the state. If the state is perceived as intolerant of people outside the norm, it may become more difficult to attract new creative, innovative, and entrepreneurial enterprises and workers.

POSITIONS:

Information from supporters of the proposal can be found at www.protectmarriageyes.org

Information from opponents can be found at www.coalitionforafairmichigan.org

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.